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No. 82-1184

In the Supreme Court of the United States

OCTOBER TERM, 1982

PETER CICALE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether there was sufficient independent evidence of petitioner's participation in a narcotics conspiracy to warrant the admission against him of a co-conspirator's statements.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 691 F.2d 95.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1982. A petition for rehearing was denied on November 16, 1982 (Pet. App. 30a-31a). The petition for a writ of certiorari was filed on January 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiracy to distribute heroin and to possess it with intent to distribute, in violation of 21 U.S.C. 846, and on one count of distribution and possession

with intent to distribute heroin, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2. He was sentenced to concurrent terms of five years' imprisonment on each count to be followed by a three-year special parole term.[1] The court of appeals affirmed (Pet. App. 1a-29a).

1. The evidence at trial, which is detailed in the opinion of the court of appeals (Pet. App. 3a-14a), disclosed a conspiracy to distribute heroin in the New York City area. In late October 1980, an informant introduced undercover DEA Agent Eloy Garcia to co-defendant John Messina. Garcia stated that he wished to secure a regular supply of heroin for his "customer" in Chicago. Messina assured Garcia that he could sell him one-half kilogram of heroin every 10 days. In November 1980, Messina sold Garcia one-eighth kilogram of heroin for $30,000[2] and indicated his eagerness to continue doing business with Garcia. In December 1980, Garcia and Messina met for lunch and Garcia again pressed for assurances of regular deliveries of heroin. Messina bragged of having "five different sources of supply." Messina later offered a kilogram of heroin to Garcia on promise of a later payment, but Garcia declined, saying that he was not in the market for isolated purchases.

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[1]Co-defendants Paul Spector and Frank DeSimone, who were tried together with petitioner, were also convicted on the conspiracy count. Spector and DeSimone were sentenced to five and six years' imprisonment, respectively. Co-defendant John Messina pleaded guilty to the conspiracy count and to three substantive counts; he was sentenced to concurrent terms of ten years' imprisonment to be followed by a six-year special parole term. Co-defendant Edward Martinez, who pleaded guilty to conspiracy and to one substantive count, was sentenced to two and one-half years' imprisonment, to be followed by a three-year term of special parole.

[2]The government stipulated at trial that neither petitioner nor his co-defendants was the source of this heroin.

On January 15, 1981, Garcia and Messina met again for lunch and Garcia suggested that he give Messina's most reliable supplier $75,000 for heroin worth $50,000. The supplier would apply the $25,000 to Garcia's next heroin purchase, and could keep the money if Garcia did not order a further delivery within a week. Messina said he would "go talk with the guy," a supplier he was going to meet right away. Within the hour, Messina and petitioner were observed together in Messina's car. They spent the entire afternoon together and Messina met with no one else during the four and one-half hours he spent with petitioner. Later that afternoon, petitioner left Messina at a restaurant and drove Messina's car to an apartment building where he met an unidentified man. Petitioner then returned to the restaurant where he spoke briefly with Messina. The next day, Garcia met with Messina to carry out the deal. Garcia had $75,000 with him and Messina, for his part, was carrying a quarter kilogram of heroin. However, when Garcia saw that Messina was not accompanied by his source, he refused to complete the deal, stating that he was interested only in a permanent relationship and not in spot purchases.

In early March 1981, Garcia again pressed Messina for a commitment to provide a regular supply of heroin for Garcia's "Chicago customer." Messina promised to talk to "a couples of sources the next day." During the following week, Messina met or spoke with possible suppliers, including petitioner, co-defendants Paul Spector and Frank DeSimone, and convicted narcotics trafficker Anthony Todisco. On March 10, Messina reported to Garcia that one source with whom he had spoken that morning[3] was unwilling to meet with Garcia but that he had another source he could contact. That night Messina called petitioner and arranged

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[3]Messina met with co-defendant Spector on the morning of March 10.

to meet with him the following day. The next day Messina and Garcia met and made firm arrangements for a sale of three and one-half kilograms of heroin at a price of $770,000. Two days later, on March 13, Garcia met with Messina and requested one-eighth kilogram of heroin for his "Chicago customer." In an apparently fruitless effort to obtain the heroin, Messina visited petitioner's home, DeSimone's house and the home of another narcotics dealer.

Over the weekend, efforts to arrange the narcotics sale continued. At one point petitioner spoke to Messina and urged, "Don't mis-shoot whatever you do * * *." The efforts to arrange the sale were frustrated when one of the suppliers (Spector) reported that he was being followed. As a result, Messina told Garcia that he was unable to get the heroin for Garcia's "Chicago customer" because his "people" were being followed and were unable to go to the "stash pad" to pick up the heroin. On March 19, Messina told Garcia that he was still having trouble obtaining the heroin but that he had an alternative source. After meeting Garcia at a restaurant in Fort Lee, New Jersey, Messina stated, "I'm going to his house, he lives down the street here." Messina then drove directly to petitioner's apartment building but petitioner was not at home. Messina reported to Garcia that his source was not home and they drove into Manhattan, where Messina left Garcia at a restaurant and began visiting other restaurants that he had visited on other occasions with petitioner. At one point, Messina called home and told his wife, "I'm out looking for Peter like crazy. I can't find him anywhere." Later, Messina rejoined Garcia and reported that he had found his source, but the source was reluctant to do business because he was entertaining relatives from out of town. (Petitioner's brother-in-law was visiting the New York area at the time.)

On March 23, 1981, Messina visited petitioner's apartment building for 15 minutes and then met with Garcia. Messina told Garcia that the deal was on and that he was going to see his source "right now to make sure everything is squared away." Messina then returned directly to petitioner's apartment building. At 9:00 p.m. that evening, Messina went to a Harlem neighborhood he had visited the night before. Later that evening, Messina met Garcia and handed over one-eighth kilogram of 100% pure heroin in exchange for $30,000 in cash. Two days later, Messina told Garcia that the same "guy" who had supplied the heroin on March 23 would also supply the three and one-half kilograms of heroin that Garcia wanted. Messina stated that he would speak with his supplier right after lunch. Messina then went directly to see petitioner.

After several further meetings between Messina and Garcia, Messina proposed a plan for consummating the 3½ kilogram sale. Messina reported that the plan had been dictated by his source and included a "mobile man," or intermediary, who would hold the $770,000 until the transaction was completed. Garcia objected and two days later proposed an alternate plan in which a DEA agent, portrayed by Garcia as his wife, would hold the money and stay with the "mobile man." At a meeting on April 7, Messina told Garcia that he would pass along Garcia's proposal to his primary source "right now, because he lives a couple of blocks from here." Messina then went to petitioner's apartment, where he remained for an hour. The next day Messina told Garcia that his source had rejected Garcia's plan. Messina agreed to raise the issue again and said, "I'll talk to the guy. He's waiting for me, so let me go, and I am going to pick him up right now at the restaurant where he is at." Messina then left and drove to a local restaurant where petitioner was waiting for him.

The 3½ kilogram heroin deal ultimately fell through, and petitioner and his co-conspirators were arrested.

2. At trial, petitioner argued that testimony concerning Messina's conversations with Agent Garcia was not admissible against petitioner because there was insufficient independent evidence of petitioner's involvement in the conspiracy. The district court rejected this argument (Pet. App. 32a-40a). The court noted that on six separate occasions Messina told Garcia that he was on his way to meet his heroin supplier, and in each case Messina was seen shortly thereafter meeting with petitioner or arriving at petitioner's apartment house (*id.* at 34a-35a & n.1).[4] The district court

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[4]The six statements in question were as follows (Pet. App. 15a-16a n.2; *id.* at 34a-35a n.1):

> January 15, 1981:
> "he said he was going to talk to him right now."
>
> March 19, 1981:
> "I'll go talk to one of my sources. * * * He said he was going to go there as soon as he left me."
>
> March 23, 1981:
> " 'I'm going to drop by the guy's house that is providing this heroin the source of supply, right now.' "
>
> March 25, 1981:
> "At that time, we entered conversations concerning as how the deal would go down or the delivery would be made, so he says 'Look, as soon as I finish eating I'm going to go over to the guy's house.' "
>
> April 7, 1981:
> " 'I will go ahead and see them, you know, the primary source right now. * * * He just lives a couple of blocks from here. * * * I will go talk to him right now because he lives a couple of blocks from here.' "
>
> April 8, 1981:
> " 'I'll talk to the guy. He's waiting for me so let me go, and I am going to pick him up right now at the restaurant where he's at.' "

concluded (*id.* at 39a) that it could consider Messina's statements as independent nonhearsay evidence linking petitioner to the heroin conspiracy because the statements were admissible "verbal acts," demonstrating that Messina's virtually contemporaneous conduct was related to his efforts to distribute heroin.

The court of appeals agreed that the six statements were admissible, but on a different theory (Pet. App. 1a-29a). The court held that the statements were declarations of Messina's future plans and therefore were admissible under Fed. R. Evid. 803(3) to show that Messina intended to engage in a transaction involving illicit drugs (Pet. App. 14a-18a). The court of appeals noted that there was some question whether Rule 803(3) permits the use of a declarant's statements as to future intentions to prove the acts of a third person, but it concluded that it need not address the question because petitioner's participation in the transaction was proven by independent eyewitness testimony (Pet. App. 16a-18a).[5]

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[5]The court explained (Pet. App. 16a-17a; footnote omitted):

> Under Fed. R. Evid. 803(3), hearsay statements reflecting a declarant's intentions or future plans are admissible to prove subsequent acts. Were [petitioner's] participation in these acts proven only by such hearsay statements, a difficult issue would arise since the legislative history of Rule 803(3) in the House indicates an intent to prevent use of a declarant's statements as to future intentions to prove the acts of a third person. This would force us to join the debate about the merit and present vitality of *Mutual Life Insurance* v. *Hillmon*, 145 U.S. 285 (1892). We need not enter that debate, however, which is fully explored in 4 J. Weinstein & M. Berger, *Weinstein's Evidence* Para. 803(3)[04]-[05] (1981), for, while Messina's statements prove the nature of the transaction he was planning, [petitioner's] participation in that transaction is proven by independent evidence.

ARGUMENT

Petitioner contends (Pet. 23-26) that the court of appeals erred in reaching the conclusion that there was sufficient nonhearsay evidence of petitioner's involvement in the conspiracy to warrant the use against him of co-conspirator Messina's statements to Agent Garcia. In petitioner's view, the court of appeals was mistaken, first, in holding Messina's statements independently admissible against petitioner under Fed. R. Evid. 803(3) as statements of Messina's intent to engage in a heroin transaction, and, second, in relying on eyewitness accounts of petitioner's meetings with Messina as establishing petitioner's participation in the heroin conspiracy. These contentions are without merit.

1. Contrary to petitioner's assertion (Pet. 25), the court of appeals did not hold that Messina's statements were admissible against petitioner under under Fed. R. Evid. 803(3) to prove *petitioner's* future conduct. Rather, the court first concluded that the statements were admissible to prove that *Messina* was involved in a conspiracy to distribute heroin (Pet. App. 17a). The court then concluded that petitioner's participation in that conspiracy was shown through other evidence, including testimony concerning petitioner's numerous conversations and meetings with Messina, especially at critical junctures, petitioner's evasive driving on several occasions, and his use of code words in his intercepted telephone conversations with Messina (Pet. App. 17a-18a).

Moreover, petitioner's complaint (Pet. 25-26) that the court of appeals engaged in impermissible fact finding is wide of the mark. In holding that there was sufficient independent evidence of petitioner's participation in the conspiracy to warrant the admission against petitioner of all of Messina's statements to Agent Garcia, the court of appeals was not engaging in improper "fact finding." Instead, the court was simply applying uncontested facts adduced at

trial to support a particular legal conclusion. Petitioner does not claim that the meetings between petitioner and Messina, on which the court of appeals relied, did not in fact occur. Thus, the fact that the court of appeals based its ruling on a different legal theory from the one adopted by the district court — and that it relied on undisputed evidence in the record as support for that different theory —does not demonstrate that the court of appeals exceeded the scope of its authority. The court of appeals merely engaged in the permissible appellate function of relying on an alternative ground for affirming the lower court's ruling. See, *e.g., Brown* v. *Allen*, 344 U.S. 443, 459 (1953); *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937).

2. The standard of independent proof of participation in a conspiracy is "lower than the standard of evidence sufficient to submit a charge of conspiracy to the jury" (*United States* v. *Alvarez-Porras*, 643 F.2d 54, 57 (2d Cir.), cert. denied, 454 U.S. 839 (1981)), and the proof may be "totally circumstantial." *United States* v. *Ragland*, 375 F.2d 471, 477 (2d Cir. 1967), cert. denied, 390 U.S. 925 (1968). In determining whether the standard has been met, the court must view the evidence as a whole, rather than considering the individual pieces in isolation. See *United States* v. *Geaney*, 417 F.2d 1116, 1121 (2d Cir. 1969), cert. denied, 397 U.S. 1028 (1970); *United States* v. *Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977). Moreover, once the existence of a conspiracy has been established, the evidence needed " 'to link another defendant with it [for purposes of determining the admissibility of co-conspirator statements] need not be overwhelming * * *.' " *United States* v. *Provenzano*, 615 F.2d 37, 45 (2d Cir. 1980), quoting *United States* v. *Head*, 546 F.2d 6, 9-10 (2d Cir. 1976), cert. denied, 430 U.S. 931 (1977). Indeed, all that is required is " 'a showing of a

likelihood of an illicit association between the declarant and the defendant.' " *United States* v. *Alvarez-Porras, supra,* 643 F.2d at 57, quoting *United States* v. *Ragland, supra,* 375 F.2d at 477.

Here, the evidence was overwhelming that Messina was involved in a heroin conspiracy. The eyewitness observations of petitioner's meetings with Messina at critical junctures and of petitioners evasive actions apparently designed to defeat visual surveillance, together with the evidence of petitioner's intercepted telephone conversations with Messina, constituted weighty and reliable independent evidence linking petitioner to the conspiracy. Once petitioner was connected to the conspiracy, Messina's statements to Agent Garcia — including the statements that he was about to meet his source — were fully admissible against petitioner as statements in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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